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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME BERNARD BUTLER,

Defendant and Appellant.

C082455

(Super. Ct. No. 14F06353)

A jury found defendant Jerome Bernard Butler guilty of second degree murder and felon in possession of a firearm. With firearm and recidivists enhancements, he was sentenced to a 95-year-to-life indeterminate term along with a 10-year determinate term.

On appeal, defendant contends (1) his trial counsel rendered ineffective assistance by failing to object when the prosecutor elicited facts underlying his prior convictions reflecting violent character; (2) CALCRIM No. 362, with which the jury was instructed, creates an impermissible inference that a defendant who makes a false statement is aware of having committed the charged crime as opposed to awareness of committing some lesser offense; (3) his prior serious felony enhancements under Penal Code section 667,

subdivision (a)<sup>1</sup> were not proved because he only admitted his prior serious felony convictions were strikes and did not expressly admit the same convictions were also prior serious felony offenses within the meaning of section 667, subdivision (a); (4) the trial court failed to explain to him the penal consequences before taking his admission to the prior felony conviction allegations; (5) his counsel rendered ineffective assistance by failing to object when the prosecutor said in closing argument, without evidence, the victim had never been convicted of a misdemeanor or felony; and (6) punishment for the firearm possession conviction should be stayed under section 654. We conclude these contentions are either without merit or forfeited.

Defendant also contends, through supplemental briefs, that remand is appropriate so the trial court may consider exercising its discretion under Senate Bill No. 620 (Stats. 2017, ch. 682, § 1) (SB 620) and Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2) (SB 1393), which allow a trial court to strike or dismiss firearm and prior serious felony enhancements. We remand in light of SB 620 and SB 1393 and otherwise affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Defendant shot and killed the victim. At trial, he maintained he had acted in self-defense.

#### **The Prosecution's Case**

The prosecutor presented evidence that on the day of the shooting, defendant's teenage stepson and the victim had argued over a bike, outside defendant's home. Afterwards, the stepson went inside and told his mother (defendant's girlfriend) he had been disrespected. Before the victim left, a neighbor heard the girlfriend and the stepson yelling, "[defendant's] gonna kill you. [Defendant's] gonna get you." The girlfriend

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

woke defendant, and soon, defendant, the girlfriend, and two others, got into a car, with the girlfriend driving.

The girlfriend drove into an apartment complex. She sped through the parking lot, “like a crazy person,” and pulled up to the victim. The girlfriend yelled at the victim about disrespecting her son. Defendant then got out of the car and yelled, “you disrespected my son.” When the girlfriend saw defendant had a gun, she screamed, “No.” Defendant shot the victim while the victim was backing up. Thirty seconds later, as the victim tried to run behind a car, defendant shot him again.

During a break in an interview with detectives, the girlfriend was recorded saying, “I don’t know why he does such stupid things. . . . That man did not do nothin’ to him like that. He’s so fuckin’ stupid, man. That fast and your life is over.”

The victim sustained gunshot wounds to his right arm, right chest and abdomen. There was no evidence of close range firing, and thus the gun was more than “a couple of feet” away.<sup>2</sup>

### **The Defense Case**

Defendant testified that he had sold methamphetamine to the victim in the past. Defendant first met the victim about six months before the shooting. He testified that in those six months, the victim had knives with him “[a]ll the time,” and he once saw him with a gun. According to defendant, the victim would brag about his speed with knives and would talk about using knives on others. Also, according to defendant, the victim’s reputation in the community was he was a bully and “just don’t mess around with him.”

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<sup>2</sup> The autopsy surgeon testified that one bullet perforated the victim’s right arm and then reentered, penetrating the right side of the chest and piercing his diaphragm and liver. This bullet travelled upward into the arm and downward into the diaphragm, indicating that the victim’s arm was up and extended when this bullet was fired. The second bullet entered the right front of the abdomen, pierced the intestine and liver, travelled upward through the diaphragm, injured the aorta and went through the victim’s left lung.

Defendant told the jury: “he would just rob people, and I even seen him pull . . . a knife out on somebody before and like threaten to cut ‘em, and they would be like backing up, . . . . He would run through their pockets. I actually seen him do that.”

Defendant testified that four months before the shooting, the victim got angry with him, thinking defendant had shorted him. The victim demanded his money back, but defendant refused. After their falling out, the victim would threaten defendant. He told defendant, “I’m gonna cut you up,” and threatened to slice and dice him. He also threatened to rob defendant and his stepson and threatened defendant’s girlfriend.

Defendant described the victim as a “pretty heavy drinker,” who “would be drunk most of the time.” He was a mean drunk according to defendant, and when the victim was on meth, he was “like an enraged mad man” and violent. According to defendant, when the victim was on meth and alcohol, “it was . . . just violence, crazy . . . you couldn’t tell him nothin’ when he’s at that point.”

Defendant testified that the day of the shooting, he was asleep. He had been up on meth for a few days before. His girlfriend’s son woke him, and almost in tears told him the victim was outside and was again threatening to beat him up. Defendant went outside and found his girlfriend yelling, but no sign of the victim. His girlfriend angrily said the victim had threatened to beat up her son, had called her names, and had threatened to shoot up the house.

Defendant got into the car with his girlfriend, his girlfriend’s son, and an acquaintance of his girlfriend. He testified they left to go pick up his daughter and son. His girlfriend drove. Defendant brought his gun because he “always took it with [him]” and didn’t like to leave things around the house. He testified that he knew he was not supposed to have a gun and by the day of the shooting, he had had the gun for “almost a month, like three or four weeks.”

Along the way, defendant saw someone who owed him money. He asked his girlfriend to turn around, so he could collect. She U-turned and drove into an apartment

complex. When she did, she saw the victim. She pulled up to him, and they started screaming at each other. The girlfriend screamed, “what you threatenin’ my son, you asshole . . . .”

Defendant told the jury that he got out of the car to try to diffuse the situation. The victim backed up, and the girlfriend continued to insult him. According to defendant, the victim appeared to be under the influence of drugs or alcohol or both.

Defendant saw a knife clipped to the victim’s shorts and a bulge in his pocket. He thought it was a gun. Defendant testified: “it was just yellin’, and then [my girlfriend] must have said something and he just snaps.” The victim said, “fuck all this. I’ll fuck all ya’ll up.” Defendant testified: “He was tryin’ to make a move towards me, and, uh, he was reachin’ for his pocket, and I was scared.” Thinking he was reaching into his pocket, defendant drew his gun and shot the victim in the arm. The victim kept coming towards him, screaming, and defendant, thinking the first shot missed, shot the victim in the stomach.

Defendant then ran to his car. He testified that he shot because “I was scared. . . .I was panicked. . . . I thought he was gonna to hurt me or possibly kill me.” After the shooting, defendant told his girlfriend and her son not to talk to the police. In a recorded jail call with his girlfriend, defendant denied knowing the victim.

### **Verdict and Sentencing**

The jury found defendant guilty of second degree murder (§ 187, subd. (a)) and found he had personally used and discharged a firearm causing death. (§ 12022.53, subds. (b)(c)(d)). It also found him guilty of felon in possession of a firearm. (§ 29800, subd. (a)(1)). Defendant admitted prior serious and violent convictions for robbery and shooting into an inhabited dwelling.

The trial court imposed an aggregate indeterminate term of 95-years-to-life along with a 10-year determinate term, calculated as follows: as to count one, a 45-year-to-life term for second degree murder as a third strike offense (15-years-to-life tripled), along

with a 25-year-to-life firearm enhancement and 10 years for two section 667, subdivision (a) serious felony convictions; and as to count two, a consecutive 25-year-to-life term for possessing a firearm as a felon as a third strike offense.

## **DISCUSSION**

### **I. Failure to Object to Facts Underlying Defendant's Prior Convictions**

Defendant contends his trial counsel rendered ineffective assistance in failing to object to the prosecutor eliciting facts underlying defendant's prior convictions. We disagree.

#### **A. Additional Background**

The People moved in limine to impeach defendant, should he testify, with several prior crimes of moral turpitude: a 1996 robbery, and convictions in 1997 for discharging a firearm at an inhabited dwelling and possessing a firearm as a felon. The trial court allowed the evidence of the priors but sanitized them, ruling that defendant “can be impeached with . . . the year, [the] fact they were felonies, and the fact they were crimes of moral turpitude. *At least for now* that will be my ruling.” (Italics added.)

After the prosecution finished its case in chief, defense counsel told the court: “As the Court may recall during our chamber conferences, we discussed briefly the People's request to — if [defendant] were to testify, to use, for impeachment under [Evidence Code section] 1103, his prior criminal convictions. [¶] At . . . that time the People indicated that they would sanitize to a certain extent those convictions to merely state that he was convicted in 1996 of a crime of moral turpitude; in 1997 a crime involving moral turpitude, and in 2003 a crime involving moral turpitude.”

“I then advised the Court that it was my belief that [defendant] will testify, and, also under [Evidence Code section] 1103, talk about the character of the alleged victim for violence. Therefore, under 1103, if [defendant] were to introduce those facts, then the People would have a right to *talk more* about [defendant's] prior criminal history, and it's my understanding that the Court ruled tentatively that if that were the case, *then the Court*

would allow [the prosecutor] to go into the actual nature of the convictions; meaning, that it was for a robbery, shooting at an inhabited dwelling in 1997, and felon in possession of a firearm in 2003.” (Italics added.)

Counsel added: “So I want to put that on the record because in light of those tentative rulings I intended to question [defendant] a certain way on direct examination.” The court responded: “Okay. You are quite correct in your articulation of the *tentatives* and the discussion.” (Italics added.)

Thereafter, defendant testified to the victim’s character for violence. He also admitted on direct examination to having prior convictions for robbery, shooting into a dwelling, and firearm possession.

On cross-examination, the prosecutor asked about defendant’s prior convictions: “In 1996 you went into a convenience store and tried to take beer without paying, right?” “And isn’t it true that you pulled out a gun, and you hit [the clerk] in the head with the gun?” In 1997, “You shot into the house of another person who you had had an argument with when there were people [in]side of that house, didn’t you?”

Defense counsel did not object.

## **B. Analysis**

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674, 693-694, 696] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma*).) “ ‘Surmounting *Strickland*’s high bar is never an easy task.’ ” (*Padilla v. Kentucky* (2010) 559 U.S. 356, 371 [176 L.Ed.2d 284, 297].) “[I]f the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance ‘unless counsel was asked for an explanation and failed to

provide one, or unless there simply could be no satisfactory explanation . . . .’ ” (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

Here, a satisfactory explanation for not objecting exists. Evidence Code Section 1103 permits the prosecution to offer evidence of “specific instances of conduct” reflecting a defendant’s character for violence if the defendant first offers evidence that the victim had a character for violence. (Evid. Code, § 1103, subd. (b).) This was the case here. Indeed, from the colloquy preceding defendant’s testimony, defense counsel showed he understood the nature of Evidence Code section 1103: “Therefore, under 1103, if [defendant] were to introduce those facts, then the People would have a right to *talk more* about [defendant’s] prior criminal history.” (Italics added.) Defense counsel therefore knew he had no cause to object to the prosecution eliciting facts underlying defendant’s prior convictions. (See *People v. Thompson* (2010) 49 Cal.4th 79, 122 [“Counsel is not ineffective for failing to make frivolous or futile motions”].)

Defendant nevertheless maintains on appeal that the trial court had in fact ruled, under Evidence Code section 352, that only the dates and crimes were admissible, despite Evidence Code section 1103. In support, he points to the trial court’s statement: “You are quite correct in your articulation of the *tentatives* and the discussion,” (italics added) after defense counsel said “it’s my understanding that the Court ruled tentatively that if [the defense shows the victim’s character for violence], then the Court would allow [the prosecutor] to go into the actual nature of the convictions; meaning, that it was for a robbery, shooting at an inhabited dwelling in 1997, and felon in possession of a firearm in 2003.” We are not persuaded. The proffered colloquy in no way evidences an Evidence Code section 352 ruling described by defendant — nor does anything else in the record. We reject this claim of ineffective assistance of counsel.

## **II. CALCRIM No. 362**

Defendant contends CALCRIM No. 362 creates a constitutionally impermissible inference by telling the jury that a defendant who makes a false statement is aware of

having committed the charged crime as opposed to some lesser offense. We find no error.

### **A. Additional Background**

During defendant's cross examination, the jury was played a recording of a jail phone call between defendant and his girlfriend. In the call, defendant denied knowing the victim: "Who the fuck is [the victim]?", "I said who the fuck is [the victim]? They tryin' to say I killed somebody named [the victim]," "I don't even know the dude."

During his trial testimony, defendant conceded he was lying: "you said in that recording that you didn't know who [the victim] was, that was a lie, right?" "Yes, Sir." Defendant admitted he knew the call was being recorded, and he lied to give the appearance he had not done anything.

Later, the trial court provided the jury with the standard instruction concerning false statements, CALCRIM No. 362: "If the defendant made a false or misleading statement before this trial relating to the charged crime knowing the statement was false or intending to mislead, that conduct may show *he was aware of his guilt of his crime* and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."<sup>3</sup> (Italics added.)

Following an informal instruction conference, the trial court listed on the record the instructions to be given the jury, including CALCRIM No. 362. Defense counsel did not object.

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<sup>3</sup> The jury was also instructed: "You must decide whether the killing in this case was unlawful and, if so, what specific crime was committed." It was then instructed on the different types of murder and manslaughter as well as self-defense.

## B. Analysis

Defendant maintains CALCRIM No. 362 creates an unconstitutional presumption that if he lied about the charged crime, the jury may infer his awareness of guilt for the charged crime as opposed to a lesser offense. He argues that a defendant might make a false statement about an event while only aware of his guilt for a lesser wrongdoing and not the crime actually charged by the prosecution. He notes the predecessor to CALCRIM No. 362, CALJIC No. 2.03 provided in relevant part: “If you find that before this trial [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which he is now being tried, you may consider that statement *as a circumstance tending to prove a consciousness of guilt.*” (Italics added)

The People respond that the challenge is forfeited for failure to object. We agree. A failure to object to instruction error forfeits the issue unless the error affects the defendant’s substantial rights, that is “ ‘whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818.’ ” (*People v. Battle* (2011) 198 Cal.App.4th 50, 64.) And here the instruction was proper.

This court rejected an identical challenge to CALCRIM No. 362 in *People v. Burton* (2018) 29 Cal.App.5th 917 (*Burton*). There, the defendant argued CALCRIM No. 362’s reference to “the charged crime” and “the crime” undermines a claim that he “may have felt a consciousness of guilt of a lesser offense than first degree murder . . . .” (*Burton* at p. 923.) Rejecting that argument, this court noted the jury had been instructed to determine “ ‘what specific crime was committed’ if any” and was instructed on second degree murder, voluntary manslaughter, and self-defense. (*Id.* at p. 925.) When the instructions were considered in totality, “the jury would understand that any consciousness of guilt evidenced by defendant’s multiple lies . . . would operate as to any degree of homicide, not merely first degree murder.” (*Ibid.*)

Here, the same results obtains.<sup>4</sup> The jury was instructed on the panoply of homicide offenses (including two degrees of murder and manslaughter) and that it was to determine what crime was committed. Thus, the jury would understand that it could infer a consciousness of some wrong doing — not necessarily consciousness of the specific charged offense. Moreover, as pointed out in *Burton*, CALCRIM No. 362 “is designed to benefit the defense,” by limiting how a jury may use a defendant’s willfully false statement. (*Burton*, *supra*, 29 Cal.App.5th at p. 925.)

Accordingly, the challenge is forfeited for failure to object, and in any event, the instruction was proper. If defendant wished for an instruction to clarify the point, it was his obligation to request one. (See *Burton*, *supra*, 29 Cal.App.5th at p. 925.)

### **III. Proof of Prior Serious Felony Conviction Allegations**

Defendant contends his two section 667, subdivision (a) prior serious felony enhancements were not proved because he was never asked to admit that the priors were serious felonies under section 667, subdivision (a). Rather, he was only asked to admit they were strikes. We conclude the challenge is forfeited and in any event, lacks merit.

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<sup>4</sup> We note that the trial court’s oral instruction differed from the standard CALCRIM No. 362 provided to the jury in writing. The trial court orally told the jury: “If the defendant made a false or misleading statement before this trial relating to *the charged crime* knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of *his crime* and you may consider it in determining his guilt.” (Italics added.) The reference to “*his crime*” instead of “*the crime*” (which is the standard language) could be understood to mean an awareness of guilt of whatever crime defendant committed, whether it be the charged crime or a lesser offense. However, both defendant and the People present their appellate arguments based on the standard language. Moreover, as our high court has stated: “ ‘To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.’ ” (*People v. Mills* (2010) 48 Cal.4th 158, 201.) Accordingly, we focus on the standard instruction provided in written form to the jury and do not base our decision on the oral instruction given by the court.

### A. Additional Background

The amended information alleged defendant had prior convictions for robbery and shooting at an inhabited structure. Both offenses were separately alleged to be both serious felonies (§ 667, subd. (a)) and strikes. (§§ 667, subds. (b)–(i); 1170.12).

After the jury indicated it had reached verdicts and before those verdicts were announced, the trial court inquired about defendant’s intent concerning the prior conviction allegations. Defense counsel told the court defendant was prepared to admit the priors. The court then took defendant’s admissions to a 1996 robbery and a 1997 shooting at an inhabited structure. In doing so, the court secured defendant’s admission that each crime was “a serious and violent felony” within the meaning of [the] three strikes law. (§§ 667(e)(2), 1170.12(c)(2)). But no mention was made that both prior convictions had also been alleged as serious felonies under section 667, subdivision (a). And defendant did not expressly admit those allegations.<sup>5</sup>

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<sup>5</sup> The admissions occurred in the following colloquy:

“[THE COURT]: Before I bring the jury in and see what their verdicts are, I wanted to ascertain from yourself what [defendant’s] desire was in terms of having the same jury decide whether these priors are true, waive jury, or just admit them.

“[DEFENSE COUNSEL]: Your Honor, in light of [defendant’s] sworn testimony throughout the . . . course of the trial . . . he is prepared *to admit the prior convictions*. (Italics added.)

“[THE COURT]: Is that correct, [defendant]?

“[DEFENDANT]: Yes, sir.

“[THE COURT]: If they convict you of either the murder or manslaughter or even if they acquit you on that and they convict you of being an ex-felon in possession, it will carry some penalty for you by having those proved to be true or by admitting them. [¶] You heard *the two priors that are alleged*. Have you had an opportunity to discuss your trial of the priors or deciding whether you want to admit them with [Defense Counsel]? (Italics added.)

“[DEFENDANT]: Yes.

“[THE COURT]: You know you are entitled to have this same jury that decided your fate on Count One and Two decide *whether or not these priors are true*, and at your trial you’re entitled to cross-examine and through your attorney question any evidence that would be presented and any witnesses that would be presented on the *trial of the*

Both counsel joined in the waiver. The trial court then found defendant made knowing and voluntary waivers and accepted his admissions. In response to the court's question whether there was anything more that needed to be done before the jury was brought in, defense counsel said no.

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priors” [¶] You also have a right to remain silent, not incriminate yourself. You have a right to present evidence, that is, bring evidence and witnesses before the Court for your defense. [¶] *By admitting these priors*, then you are incriminating yourself and there won't be a need for a trial. [¶] You have discussed those rights with your attorney, [Defense Counsel]? (Italics added.)

“[DEFENDANT]: Yes, sir.

“[THE COURT]: Do you have any questions about what you're doing today regarding *waiving those rights and admitting those priors*? (Italics added.)

“[DEFENDANT]: No, sir.

“[THE COURT]: You're clear on what you are doing?

“[DEFENDANT]: Yes.

“[THE COURT]: All right. Then with full knowledge and understanding of each of your rights do you freely and voluntarily waive and give up all of those rights *concerning the prior convictions*? (Italics added.)

“[DEFENDANT]: Yes.

“[THE COURT]: Any questions about what you are doing here today?

“[DEFENDANT]: No, sir.

...

“[THE COURT]: All right. The Prior Conviction Number One alleges on February 15, 1996, Sacramento County, it's alleged you were convicted of the crime of robbery in violation of Penal Code section 211, *which is a serious and violent felony*. It's being alleged as a strike within the meaning of three strikes law, that is, 667(3)(2) and 1170.12(c)(2). *Do you admit or deny having been convicted of a robbery* on February 15th, 1996, Sacramento County? (Italics added.)

“[DEFENDANT]: Yes, I do.

“[THE COURT]: Okay. And Prior Conviction Number Two alleges you were convicted October 16, 1997, again Sacramento County, shooting at an inhabited structure in violation of Penal Code section 246. It's again alleged for purposes of three strikes consideration, within the meaning of Penal Code section 667(e)(2) and 1170.12(c). [¶] Do you admit or deny having been convicted of *a serious and violent felony*, shooting at an inhabited structure, 246 of the Penal Code violation [sic], October 16th 1997. [¶] Admit or deny? (Italics added.)

“[DEFENDANT]: I admit.”

The trial court ultimately imposed two consecutive five-year prior serious felony enhancements under section 667, subdivision (a). After imposing the firearm enhancement on count one, the court stated: “In addition, because these are strikes within the meaning of the three strikes law *and it was alleged within the meaning of Penal Code section 667(a)*, it carries an additional sentence per strike. [¶] So for Count One it is 45 years to life plus 25 years to life *plus ten years.*” (Italics added.) At the end of the sentencing hearing, the court asked, “Is there anything else I should do prior to remanding [defendant]?” Defense counsel raised no objection to the sentencing on the section 667, subdivision (a) enhancements.

### **B. Analysis**

On appeal, defendant contends the serious felony enhancements under section 667, subdivision (a) must be stricken because he never expressly admitted to those allegations and thus, they were not proven beyond a reasonable doubt. The People, citing *People v. Scott* (1994) 9 Cal.4th 331, 355-356, argue the claim is forfeited for failure to object at or before sentencing and if not forfeited, the contention should be rejected on the merits. We agree with the People.

Defendant unquestionably admitted both prior convictions. The amended complaint separately alleged as to each prior conviction that they were strikes as well as serious felonies. Indeed, the allegation that they were serious felonies under section 667, subdivision (a) was added by amendment at the beginning of the trial. When the trial court granted the prosecution’s proposed amendment, it did so in defendant’s presence, explaining: “You are now adding the 667(a), a serious felony with a prior serious felony, [which] will result in [an] additional five years per prior conviction.” And before defendant admitted the priors, the trial court informed him that they were serious felony convictions.

Later, when defendant was sentenced, not only was no objection raised, but nothing in the record indicates defendant did not believe he had admitted the priors as

serious felony convictions within the meaning of section 667, subdivision (a). And nothing indicated he would have admitted the priors as strikes but not section 667, subdivision (a) serious felonies.

Under the circumstances, the contention is forfeited for failure to object. (Cf. *People v. Scott, supra*, 9 Cal.4th at p. 353 [“Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention”]; *People v. Maxey* (1985) 172 Cal.App.3d 661, 668 [defendant may not stand silently by or acquiesce in a finding that his prior burglary was theft related and then contend on appeal that it was committed without the intent to commit theft].)

Even if not forfeited, defendant’s contention fails on the merits. We have no trouble concluding defendant admitted to two serious felony convictions. Both were described to defendant before his admission. And both convictions are, as a matter of law, serious and violent felonies. (See §§ 667, subdivision (a)(4) and 1192.7, subd. (c).)

Further, under section 1025, subdivision (b), defendant was entitled to a jury trial as to whether he had been convicted of the prior offenses, not whether they constituted serious felonies.<sup>6</sup> The trial court determines whether the prior convictions qualify as serious felonies, not the jury. (*People v. Kelii* (1999) 21 Cal.4th 452, 458; *People v. Navarette* (2016) 4 Cal.App.5th 829, 844.) And here the trial court impliedly found they were serious felonies under section 667, subdivision (a) by virtue of it taking defendant’s admissions, explaining that each conviction was a serious felony, and ultimately sentencing defendant under that enhancement statute. (See *People v. Clair* (1992)

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<sup>6</sup> Section 1025 subdivision (b) provides: “Except as provided in subdivision (c), *the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury . . .*” (Italics added.) Section 1025, subdivision (c) provides: “Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.”

2 Cal.4th 629, 691, fn. 17 [defendant waived jury trial and consented to a bench trial on his prior serious felony allegation; although trial court did not make an express finding that the prior conviction allegation was a serious felony, it made an implied finding by sentencing defendant to that enhancement].)

#### **IV. Explanation of Penal Consequences of the Admission to Prior Convictions**

Defendant next contends his admissions to his prior felony convictions should be reversed because the trial court failed to admonish him of the penal consequences of his admissions. We disagree.

In taking his admission to the prior convictions, the trial court advised defendant of his *Boykin–Tahl* rights.<sup>7</sup> But the court failed to advise him of the penal consequences of the admissions beyond noting the priors, “will carry some penalty for you by having those proved to be true or by admitting them.” (See *In re Yurko* (1974) 10 Cal.3d 857, 864.)

“[W]hen the only error is a failure to advise of the consequences of the plea, the error is waived if not raised at or before sentencing.”<sup>8</sup> (*People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023 overruled on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177, 183; *People v. Wrice* (1995) 38 Cal.App.4th 767, 770–771.) This being the case here, the failure to object at or before sentencing forfeits the contention.<sup>9</sup>

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<sup>7</sup> See *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122.

<sup>8</sup> We reject, as unsupported, defendant’s argument that *People v. Cross* (2015) 61 Cal.4th 164 stands for the position that an isolated failure to advise on penal consequences is not subject to forfeiture.

<sup>9</sup> And in any event, as discussed in the preceding section, the record amply shows the admission was voluntary and intelligent under the totality of the circumstances. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1175 [With *Yurko* error, “a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances.”].)

## **V. Prosecution Closing Argument**

Defendant contends his trial counsel rendered ineffective assistance in failing to object when during closing argument, the prosecutor said — with no evidentiary basis — the victim had never been convicted of a misdemeanor or felony. We find no error requiring reversal.

### **A. Additional Background**

During closing argument, the prosecutor attacked defendant's contention that the victim was violent, arguing: "In no way am I saying [the victim] was an Angel. I am not trying to say that. What I am trying to do is when the defendant paints him as this enraged mad man, as his words were, this violent horrible, horribly scary guy that the defendant says he is, you must consider the source." He went on to mention defendant's admission of prior felonies and contrasted them with the victim: "Consider the source of [the victim's] violent nature. You never heard any evidence that [the victim] was convicted of a crime of violence, whether misdemeanor or felony *because he was not*. You would have heard that testimony or seen that evidence if he, [the victim], was ever convicted of a crime of violence. *You didn't hear that because he wasn't.*" (Italics added.)

### **B. Analysis**

On appeal, defendant acknowledges his counsel's failure to object forfeits the challenge. (See *People v. Wrest* (1992) 3 Cal.4th 1088, 1105 ["by failing to interpose any objection at trial, defendant waived any error or misconduct emanating from the prosecutor's argument that could have been cured by a timely admonition"].) He, nevertheless, contends his counsel rendered ineffective assistance in failing to object because there was no evidence the victim had not been convicted of a misdemeanor or felony. We disagree.

Saying the victim had not been convicted of a crime without an evidentiary basis was, indeed, misconduct. A prosecutor can properly draw inferences from the state of the

evidence, including commenting on the absence of evidence. (See *People v. Cook* (2006) 39 Cal.4th 566, 608 [“A prosecutor may make fair comment on the state of the evidence”]; *People v. Dennis* (1998) 17 Cal.4th 468, 522 [“Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial”].) Thus, the prosecutor here could have commented that there was no evidence the victim had been convicted of a violent crime. However, stating flat out that the victim, “was not” and “wasn’t,” convicted of a crime went well beyond a permissive inference. An objection would have been valid.

Still, we can see how a seasoned trial attorney may have made the tactical decision not to object. (See *People v. Torres* (1995) 33 Cal.App.4th 37, 48 [“Generally, the failure to make objections is a matter of trial tactics which appellate courts will not second-guess”].) While an objection would have garnered an admonition, it would have worked to prolong the prosecutor’s point, and invited the prosecutor to repeat the non-objectionable portion following the admonition — that there was no evidence of any such convictions. Defense counsel may well have opted to forgo the objection and instead address it in closing. Indeed, during closing, defense counsel turned the tables: “At no time did the prosecution ever challenge the violent propensities of [the victim].” In sum, on the record before us, we are unwilling to conclude counsel rendered ineffective assistance. (See *Harrington v. Richter* (2011) 562 U.S. 86, 105 [178 L.Ed.2d at p. 642] [“Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence’ ”].)

And in any event, defendant has not established prejudice. Prejudice requires more than showing “ ‘the errors had some conceivable effect on the outcome of the proceeding.’ ” (*Richter, supra*, 562 U.S at p. 104.) Prejudice requires showing a reasonable probability of a more favorable result had counsel’s performance not been

deficient. (*Strickland, supra*, 466 U.S. at pp. 693-694; *Ledesma, supra*, 43 Cal.3d 171, at pp. 217-218.) The likelihood of a different result must be substantial, not just conceivable. (*Richter* at p. 112.)

Here, the fact that the victim had never suffered a conviction was not necessarily inconsistent with the defense. Defendant testified that the victim was a violent, dangerous, drug user, who would rob people; he never claimed the victim had ever been caught. And had the prosecutor simply argued there was no evidence that the victim had been convicted of any violent offenses — which would have been proper — the result would have been the same.

This claim of ineffective assistance of counsel fails.

## **VI. Section 654**

Defendant next contends punishment for the firearm possession count must be stayed pursuant to section 654. He argues his case is similar to *People v. Cruz* (1978) 83 Cal.App.3d 308 (*Cruz*), in which section 654 was held to apply where a defendant was convicted of assault with a deadly weapon and felon in possession of a firearm. This contention is meritless.

Section 654 proscribes multiple punishment where an act or course of conduct is punishable in different ways. (§ 654; *People v. Correa* (2012) 54 Cal.4th 331, 337.) In *Cruz, supra*, 83 Cal.App.3d 308, 333, cited by defendant, section 654 applied because there was no evidence Cruz's gun possession was antecedent and separate from his assault. Cruz had tried to get into a bar. (*Cruz* at p. 314.) When the doorman refused him, Cruz left but returned a few minutes later, armed with a gun. (*Ibid.*) He shot the doorman and several others. He then fled and subsequently pointed a gun at someone chasing him. (*Ibid.*) The court of appeal held section 654 barred multiple punishment as “[t]he prosecution failed to prove that defendant’s possession of the handgun was ‘antecedent and separate’ from his use in the assaults.” (*Cruz* at p. 333.)

Here, however, defendant indisputably possessed the gun well before the murder. He testified he had owned the gun for “almost a month, like three or four weeks,” before using it in the murder. And he would “always” take the gun with him. Further, a holster and a bag of bullets were found in his bedroom. In sum, the contention that punishment for the gun possession count must be stayed under section 654 borders on frivolous.

## **VII. SB 620 and SB 1393**

Finally, in supplemental briefs, defendant contends that remand is appropriate so the trial court may consider exercising its newly authorized discretion under SB 620 and SB 1393. The People agree and so do we.

SB 620 empowers a trial court to strike or dismiss firearm enhancements imposed under section 12022.53. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 424.) SB 1393 does the same for prior serious felony enhancements imposed under section 667, subdivision (a). (*People v. Jones* (2019) 32 Cal.App.5th 267, 272.) Both SB 620 and SB 1393 apply retroactively where a defendant’s sentence is not yet final. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [remanding pursuant to SB 620]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [SB 1393].)

We will remand to allow the trial court to consider exercising its authority under SB 620 and SB 1393.

### **DISPOSITION**

The cause is remanded so the trial court may consider exercising its discretion under SB 620 and SB 1393.

In all other respects, the judgment is affirmed.

                  /s/                    
MURRAY, J.

We concur:

                  /s/                    
RAYE, P. J.

                  /s/                    
BUTZ, J.